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No. 82-

IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

BORDEN, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should a company that has lawfully obtained a dominant position in the market be prohibited from responding to local competition by gradually lowering its prices in an attempt to meet competition and reduce its loss of market share?

2. Should a company that sells a premium-priced product which has gained consumer acceptance and a dominant position in the market be prohibited from engaging in vigorous price competition, where the company never sells the product below cost?

3. Should a company that is forced by competition to lower prices or lose sales be deemed to have "monopoly power" because it has a large percentage share of an artificial and narrowly-defined product market and because consumers are willing to pay more for its brand-name product?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 674 F.2d 498 (6th Cir. 1982). The opinions of the Federal Trade Commission and of its Administrative Law Judge are reported at 92 F.T.C. 669 (1978). All of the opinions are reproduced in the separately-bound Appendix submitted herewith.[1]

[1] The following abbreviations are used in citing the opinions below and the corresponding page numbers in the Appendix:

CA: the Court of Appeals opinions (pages CA-1a through CA-38a).

FTC: the FTC opinions (pages FTC-39a through FTC-94a).

ALJ: the Administrative Law Judge's opinion (pages ALJ-94a through ALJ-200a).

References to portions of the record, other than the opinions below, are to the Joint Appendix ("JA") filed in the Court of Appeals.

JURISDICTION

The Court of Appeals entered judgment on February 24, 1982. Borden filed a timely petition for rehearing and suggestion for rehearing *en banc* on March 10, 1982, which was denied on April 12, 1982. By Order of this Court dated June 29, 1982, Borden's time for filing a Petition for a Writ of Certiorari was extended to August 25, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The FTC commenced this proceeding under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), which provides:

> "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

The FTC, as well as the Sixth Circuit (CA-10a-11a; FTC-42a n.4), treated the case as one brought under Section 2 of the Sherman Act, 15 U.S.C. § 2, which provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

STATEMENT OF THE CASE

Petitioner seeks review of a divided decision of the Sixth Circuit Court of Appeals, affirming a decision of the Federal Trade Commission, which held that Borden had unlawfully monopolized the market for processed lemon juice by "selectively" reducing its prices "in geographic markets where Borden faced competition from Golden Crown Citrus Corporation. . . ." (CA-la; FTC-57a). The Sixth Circuit

affirmed an order that prohibits Borden from lowering its prices in local markets where it is losing business to price-cutting competitors and that requires Borden to charge essentially uniform national prices. (FTC-93a-94a).

The Underlying Facts

Borden, Inc.[2] is the manufacturer of "ReaLemon" brand reconstituted lemon juice. "ReaLemon was the first firm to develop and market a bottled lemon juice," and, as a result, "it naturally had a monopoly in the market at the outset."[3] (FTC-53a). During the 1970's, however, ReaLemon's market position was successfully challenged, first regionally by Golden Crown (which was acquired by The Seven-Up Company in 1974), then nationally by Minute Maid (which is owned by The Coca-Cola Company). (FTC-62a; JA-412).

The FTC's complaint focused on the 1970-1974 period and Borden's competition with Golden Crown. During that period, Golden Crown rapidly expanded from its original Chicago-area base to most other areas of the country. (ALJ-141a-142a). Its "method of expansion was to sell its product to retailers at prices well below those of ReaLemon." (CA-3a). Those low prices were made possible in part by

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[2] Pursuant to Supreme Court Rule 28.1, Borden states that it has no parent company. Its domestic subsidiaries and affiliates (other than wholly owned subsidiaries) are: Bayaman Can Corp., Coco Lopez Mfg. Corp., Coco Lopez of New York, Inc., Illinois Nitrogen Corp., Industrias La Famosa, Inc., John Robert Powers Attractions, Inc., Monochem, Inc., Productos Damita, Inc., and The Viking Engraving Corp.

[3] The FTC defined the relevant product market as "processed lemon juice," excluding fresh lemons from the market definition even though the juice of fresh lemons can be and is substituted for every use of reconstituted lemon juice. (FTC-49a). In this narrowly-defined market, annual sales are only $25 million. (ALJ-95a).

Golden Crown's practice of "routinely" adulterating its product with cheaper ingredients.[4] Golden Crown's "extremely low or below cost prices" (ALJ-178a) undersold not only ReaLemon, but also ReaLemon's lower-priced competitors.[5] As a result, several local bottlers of lemon juice lost large parts of their business and were driven out of a number of markets. (FTC-59a; ALJ-142a; JA-85).

When "the significant price differential between Golden Crown and ReaLemon began to make inroads on [its] sales" (CA-3a), Borden reacted with "progressively more vigorous price . . . responses to Golden Crown, running over a period of four years," which did not "reach [their] peak until . . . [ReaLemon's] national share had fallen by 8 percentage points and Golden Crown's had risen by 13. . . ." (FTC-75a n.4, 89a n.14, Clanton, C., and Pitofsky, C., concurring). Throughout this period, ReaLemon's prices were always higher than Golden Crown's, generally by "10 to 21 cents per bottle," and ReaLemon did not even *begin* to reduce its prices until Golden Crown started charging *half* the price of ReaLemon. (FTC-62a; see JA-666, 784, 817-35, 1117-19). Moreover, ReaLemon's prices were always above its average variable cost for the product. (ALJ-176a-177a; FTC-68a). Golden Crown was thus able to capture 15% of the national market (as defined by the FTC) and a much higher share of

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[4] "Golden Crown's reconstituted lemon juice was adulterated with citric acid and sugar. . . . The evidence proves beyond question that Golden Crown routinely, at least during significant production periods, manufactured its reconstituted lemon juice using substantial amounts of citric acid and sugar. . . . There was also no disclosure, it may be noted, on the Golden Crown label of the presence of sugar and citric acid." (ALJ-176a n.3).

[5] Most of ReaLemon's competitors charged lower prices for their processed lemon juice, although Minute Maid and VitaPakt charged higher prices. (JA-39-40, 426).

many local markets. (ALJ-127a; JA-606, 1086). Another competitor, Minute Maid, was able to expand even more dramatically; during six months of 1976, its share jumped from 5.6% to 18.2%. (JA-1190-91). In the meantime, ReaLemon's share of sales fell rapidly:

Year	ReaLemon's Share of Sales[6]	
	By Dollars	By Gallons
1969	88.9%	88.7%
1970	87.1%	86.1%
1971	86.1%	84.2%
1972	82.9%	80.2%
1973	79.9%	77.4%
1974	77.8%	75.3%
1976	65.4%	69.9%

[6] ALJ-127a; FTC-66a n.40*; JA-1190-91.

The Proceedings Below

The FTC commenced this proceeding in July 1974 and, following a trial before an administrative law judge, issued its decision in November 1978. Chairman Pertschuk's majority opinion concluded (1) that in spite of the evidence of competition between fresh lemons and bottled lemon juice, "processed lemon juice" was an appropriate product market (FTC-49a); (2) that Borden possessed "monopoly power" in this market because of its large percentage share and because ReaLemon, "one of the greatest brand names in the history of the supermarket," was "able to command a substantial price premium" relative to most other brands (FTC-50a-51a); and (3) that Borden had violated Section 2 of the Sherman Act because it had maintained its market share through price reductions that were "not economically inevitable." (FTC-55a). Even though Borden's prices were never below cost and were always profitable (FTC-89a), the FTC held that Borden's prices were "unreasonably low" because they forced Golden Crown, which had entered the

market with "extremely low or below cost prices," to continue selling at a loss if it wished to keep the business it had taken away from Borden. The FTC therefore entered a cease-and-desist order prohibiting Borden from charging "unreasonably low prices"[7] and requiring Borden to maintain what Commissioner Pitofsky called a "legally mandated supra-competitive price." (FTC-81a).

Three of the five Commissioners also condemned Borden's practice of "tailoring" its price reductions "to the competitive situation in individual areas." (FTC-58a). The cease-and-desist order therefore also requires Borden to charge uniform national prices, with reductions allowed only to the extent "attributable to differing costs." (FTC-93a). Two Commissioners dissented from this holding; as Commissioner Clanton explained, the majority's approach "sacrifices both efficiency and consumer welfare and is contrary to the overriding goal of the antitrust laws to protect competition, not competitors." (FTC-74a-75a).

A divided panel of the Sixth Circuit Court of Appeals affirmed in February 1982. The majority adopted the FTC's market definition and finding of monopoly power, and held that Borden's price reductions were predatory because they "affected competition adversely through selective geographic price promotions and unreasonably low prices." (CA-29a). Judge Kennedy filed a vigorous dissent:

> "Borden surely meant to obtain as much of the reconstituted lemon juice market as it could, but that is the very essence of normal competition, a goal that we approve even for a monopolist. Despite the majority's assertion to the contrary this *is* simple, healthy com-

[7] Under the order, unreasonableness is to be "determined by reference to Borden's own costs, its awareness of its competitors' costs, historic price differentials, and competitive conditions in the market." (FTC-68a n.41, 94a).

petition. The alternative is that Borden must have intended not to respond when its market share began to disappear, but not even a monopolist need act so irrationally. . . . It is simply good business practice, not a use of monopoly power, to lower prices only where competition is stiff." (CA-35a).

REASONS FOR GRANTING THE WRIT

I. A Company That Has Lawfully Obtained A Dominant Market Position Should Not Be Prohibited From Responding To Local Competition By Reducing Its Prices

The decision below creates a conflict with six other Circuits that have upheld the right of any seller, even a monopolist, to meet its competitors' prices.[8] Moreover, the decision is extraordinarily anti-competitive, insisting that Borden maintain uniform national prices so that "new or toehold entrants [can] penetrate markets without fear" of local price competition from Borden. (FTC-69a). This Court should grant certiorari to reaffirm that "the antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*' "[9] and to resolve the newly-created conflict between the Circuits on the question of whether a firm's *profitable* price competition can be regarded as pred-

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[8] *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 86-93 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982); *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723-25 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980); *SuperTurf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 742-43 (9th Cir. 1979); *Pacific Engineering Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

[9] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (Court's emphasis).

atory. The issue is vitally important because "predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote." *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982).

A. A Dominant Firm That Is Losing Business To A Price-Cutting Competitor Is Allowed To Lower Its Prices To Meet Competition

Every recent monopolization case has rejected the position adopted below that a monopolist must maintain a "price umbrella" so that new competitors can enter the market and take away its business. These cases recognize that every seller may "aggressively compete in the marketplace"; "even if [defendant] is a monopolist, it [is] within its rights to respond to the lower prices of its competitors." *SuperTurf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1280-81 (8th Cir. 1981). For example, the Ninth Circuit affirmed a directed verdict in *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 739, 741-42 (9th Cir. 1979), holding that "IBM had the right to respond to the lower prices of its competitors" because such "price cuts were a part of the very competitive process the Sherman Act was designed to promote." As explained in a related case:

> "A company should not be guilty of predatory pricing, regardless of its costs, when it reduces prices to meet lower prices already being charged by its competitors. To force a company to maintain non-competitive prices would be to turn the antitrust laws on their head." *ILC Peripherals Leasing Corp.* v. *IBM*, 458 F.Supp. 423, 433 (N.D. Cal. 1978), *aff'd per curiam sub nom. Memorex Corp.* v. *IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

Similarly, the Tenth Circuit has twice reversed trial judges who erroneously found "predatory pricing" when monopolists were reacting to the lower prices of their competitors. *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Telex Corp.* v. *IBM*, 510 F.2d 894, 926-28 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).[10] The Second Circuit likewise reversed a finding of predatory pricing in *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 87 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982), rejecting the idea that a monopolist must maintain "a price 'umbrella' under which less efficient firms could hide from the stresses and storms of competition." On similar grounds, the Seventh Circuit affirmed a directed verdict in favor of a monopolist who had underpriced a small rival, concluding that this was "the essence of competition," not predatory pricing. *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 433 (7th Cir. 1980). The Fifth Circuit agreed in a case where the plaintiff alleged that he could not compete because a monopolist had lowered prices in the plaintiff's area to a point below the plaintiff's costs. *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 724-25 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Because the decision below ignored these cases and denied Borden the right to respond to the lower prices of its competitors, this Court should grant certiorari to make it clear that even a monopolist is allowed to engage in normal price competition.

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[10] In *Pacific Engineering*, even though the monopolist knew its competitor "could not survive at the low price level," the Tenth Circuit nevertheless held that the monopolist had no obligation "to raise prices to a noncompetitive level in order to save its smaller, undercapitalized rival." 551 F.2d at 792, 795.

B. A Dominant Firm Can Tailor Its Price Reductions To Those Markets Where Competition Is Strong And Prices Are Low

This Court should also reverse the unprecedented holding that a monopolist must maintain essentially uniform national prices, regardless of local competition. Such a rule is in "open conflict with the purposes of . . . antitrust legislation," for it "would lead to just such price uniformity and rigidity" that the Sherman Act was designed to prevent. *See Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979). As Judge Kennedy explained in her dissent: "It is simply good business practice, not a use of monopoly power, to lower prices only where the competition is stiff." (CA-35a).

The decision below conflicts with many recent monopolization cases that have presented exactly the situation found here. In each of those cases, the defendant reduced prices only in those geographic or product markets where it faced vigorous competition; yet, allegations of predatory pricing were uniformly rejected as a matter of law.[11] "The fact that [defendant] was charging higher prices in another submarket does not change its legitimate competition into an injury to competition." *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

The decision also conflicts with the Robinson-Patman Act, in which Congress specifically legislated on the subject of

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[11] *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 854-55 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 740 (9th Cir. 1979); *Telex Corp.* v. *IBM*, 510 F.2d 894, 924 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

price discrimination. The Act makes it unlawful "to discriminate in price . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly." This prohibition, however, is subject to one paramount right: the seller is entitled *"to meet an equally low price of a competitor. . . ."*[12] Thus, Congress weighed the competing policies and concluded that encouraging competition is more important than prohibiting "price discrimination," even when the result may be "to create a monopoly." This right to meet competition is "an absolute defense to liability for price discrimination." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 450 (1978). The decision below, however, turned that congressional judgment on its head; the decree is patterned on the Robinson-Patman Act, but deliberately omits the right "to meet an equally low price of a competitor." Accordingly, this Court should grant certiorari and reverse the decision below.

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[12] The Robinson-Patman Act, 15 U.S.C. § 13, provides in pertinent part:

> "(a) It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition. . . . *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .
>
> "(b) . . . *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."

II. A Dominant Firm That Sells A Product Which Has Gained Consumer Acceptance Should Not Be Prohibited From Engaging In Vigorous Price Competition As Long As Its Prices Remain Above Cost

A. Predatory Pricing Does Not Occur Unless Prices Fall Below Cost

The conclusion below that Borden engaged in predatory pricing, even though its sales were always profitable and its prices always above cost, also conflicts with the position taken by the Second, Fifth, Seventh, Eighth, Ninth and Tenth Circuits.[13] These courts agree that a price above cost "is a fairly competitive price, for it is profitable to the monopolist if not to its rivals." *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Such a price "contribute[s] to the company's cash flow" and thus reflects "rational, competitive behavior." *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). As the Seventh Circuit explained:

> "In selling at a level which was above average variable cost, [defendant] acted in an economically rational manner, derived immediate benefit from its sales, and did not engage in the 'deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition.'" *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980), *quoting* P. Areeda & D. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 698 (1975).

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[13] Indeed, "virtually every court and commentator agrees upon the legality of a price exceeding average cost, perhaps conclusively but at least presumptively." P. Areeda, *Antitrust Law* ¶ 711.1 (Supp. 1982).

The courts have identified several reasons for examining the relationship between prices and costs when judging predatory pricing claims. First, "pricing at marginal cost is the competitive and socially optimal result."[14] "Forcing a monopolist to charge a price higher than marginal cost could reduce industry output and waste economic resources." *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Second, this test "has the considerable virtue of offering a single bright line formulation which would provide guidance as to permissible behavior to businessmen and also guidance to the courts and enforcement agencies." (FTC-84a, Pitofsky, C., concurring). And third, when a price exceeds cost there is no danger that the dominant firm is "subsidizing" its price reductions with profits earned in less competitive markets; the very fact that prices are above cost means that every sale adds to profits and none need a subsidy. Thus, the lower courts have consistently held that "subsidization" can occur *only* when price falls below cost.[15]

The present case, like those discussed above, was tried on the theory that Borden had sold ReaLemon at prices below cost—specifically, at prices below *average variable cost*, one

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[14] *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 857 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *SuperTurf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *accord*, *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

[15] *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 725 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 89 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982); *ILC Peripherals Leasing Corp.* v. *IBM*, 458 F.Supp. 423, 432 (N.D. Cal. 1978), *aff'd per curiam sub nom. Memorex Corp.* v. *IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

of the generally accepted tests for predatory pricing.[16] The allegation, however, was clearly disproven: "The ALJ did not find that 'ReaLemon' was sold below cost, nor do we." (FTC-68a). Nevertheless, the court below found predatory pricing, reaching a result contrary to the law of six other Circuits. This Court should resolve the conflict and hold that *profitable* price competition is lawful. As long as this straightforward test for predatory pricing is used, there is no conflict between the seller's goal of seeking higher profits, the economist's goal of promoting efficiency, and the Sherman Act's goal of facilitating competition.

B. A Dominant Firm Is Not Required To Avoid Otherwise Lawful Price Competition Simply Because Consumers Are Willing To Pay A Premium Price For Its Products

The court below ignored Borden's right to meet competition and to charge any price above cost because it found this case to present "the unique situation of a monopolist marketing a product which could command a premium price, giving

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[16] The lower courts are in general agreement that the proper measure of cost is *marginal cost*, but "because marginal cost cannot be determined from conventional accounting methods, we will use *average variable cost* as its surrogate." *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 88 (2d Cir. 1981) (citing cases from four other Circuits), *cert. denied*, 102 S.Ct. 1438 (1982). "*Marginal cost* is the increment to total cost that results from producing an additional increment of output. . . . *Variable costs*, as the name implies, are costs that vary with changes in output." Areeda & Turner, *supra*, 88 Harv. L. Rev. at 700 (emphasis added). Variable costs are distinguished from fixed costs, such as the cost of a plant, that must be paid regardless of the quantity produced.

In the present case, the FTC's expert witness recommended the use of such an average variable cost test (JA-52-53), and that was the basis for the unsuccessful attempt to prove that Borden's prices had fallen below cost. (ALJ-166a-176a).

it significant pricing leverage over its competitors."[17] (CA-28a-29a). The court held that because Borden had traditionally charged a higher price than most other sellers, it must continue to do so; any reduction in prices to recapture lost business was seen as "manipulation" of the "price premium" and therefore illegal.

The so-called price premium, however, is not "unique" and certainly does not justify a deviation from the established law of monopolization. Many well-known brand names bring higher prices, but that fact has never limited the seller's right to compete. For example, in *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 740 n.23 (9th Cir. 1979), the evidence showed that IBM's products commanded a price premium; competitors could take business away from IBM only by charging significantly lower prices. But that fact did not affect IBM's right to cut its own prices. On the contrary, the court held that the plaintiff's failure to show sales by IBM at prices below cost "was a failure as a matter of law to present a *prima facie* case under § 2." 613 F.2d at 742-43. Similarly, the Tenth Circuit has held that a monopolist can respond to a competitor's price cuts even if it knows the competitor "could not survive at the low price level." *Pacific Engineering Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 792 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). *Accord, International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723-25 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

[17] The "price premium" is simply a reflection of the fact that consumers have learned to trust ReaLemon as a quality product and are willing to pay a few pennies more for ReaLemon than for most other brands. As Judge Kennedy observed, consumers "pay extra for ReaLemon to minimize their risk of receiving inferior goods," such as Golden Crown's adulterated product. (CA-38, n.5).

The real basis for the FTC's decision, upheld by the Sixth Circuit, was the belief that ReaLemon's "price premium" was *undeserved*, and thus monopolistic, because it was not the "consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). Chairman Pertschuk said he could not "avoid a value judgment" that it is "socially undesirable" for monopolists to prevail over "producers handicapped only by an inferior brand image."[18] (FTC-65a). His majority opinion repeatedly condemned ReaLemon's "spurious product differentiation" and "image-inducted [*sic*] price premium" which "stemmed from the creation of 'an almost imaginary superiority' in the consumer's mind." (FTC-62a, 63a, 66a). He believed consumers were unwisely paying extra money: "ReaLemon is distinguished from its competitors only by the strength of its trademark." (FTC-66a).

The FTC completely misunderstood *Grinnell* and this Court's statement that "growth or development as a consequence of a superior product" is not monopolization. Under *Grinnell*, superiority is determined by consumers in the marketplace, not by the FTC on the basis of its dubious "value judgment." As the Second Circuit pointed out: "If a monopolist's products gain acceptance in the market, . . . it is of no importance that a judge or jury may later regard them as inferior, so long as that success was not based on any form of coercion." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 287 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Judge Kennedy was certainly correct when she wrote that the FTC's "value judgment . . . has nothing to do with the 'use of monopoly power' that Sec-

[18] Of course, Golden Crown suffered from more than "an inferior brand image." Its product was "adulterated," and thus, "consumers may have preferred the taste of ReaLemon to Golden Crown." (ALJ-176a n.3; FTC-50a n.16).

tion 2 reaches. Whether I agree or disagree with [this] value judgment, it has no place here." (CA-36a n.2).

The FTC also misunderstood this Court's statement in *Grinnell* that growth through "business acumen" is lawful. Such "business acumen" undoubtedly encompasses "shrewdness in profitable price competition." *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 742 (9th Cir. 1979). It also encompasses Borden's success in convincing consumers to buy ReaLemon. As Judge Kennedy pointed out in her dissent:

> "Successfully promoting one's product is the epitome of the 'business acumen' that *Grinnell* states is *not* monopolization. . . . It is not a violation of the antitrust laws for a monopolist to take advantage of a consumer preference at the expense of its competitors." (CA-35a, 37a-38a) (emphasis in original).

Section 2 is directed at conduct "which makes it impossible for other persons to engage in fair competition," not at "ordinary marketing methods available to all in the market."[19] In this case, Borden used only such "ordinary marketing methods," all of which were available to its competitors. Any company was free to sell the product that ReaLemon invented and to enter the market that ReaLemon developed. Any company could bottle the product, register a trademark, promote it, and attempt to convince consumers that its product was as good as ReaLemon's. The FTC thought that Borden's marketing methods were not "available" to its competitors because their brand names did not *instantly* have the same degree of consumer acceptance that

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[19] *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 390 & n.15 (1956) (quoting legislative history); *Telex Corp.* v. *IBM*, 510 F.2d 894, 926 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 93 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982).

ReaLemon had achieved through years of providing a quality product. But the Sherman Act does not guarantee overnight success. It is not a crutch for new entrants who cannot withstand honest, head-to-head competition in the marketplace. Sellers are not entitled to the protection of an "umbrella price," as the FTC held. Nor are they entitled to be free from local price competition, as the FTC decreed. Because the decision below ignored these principles, certiorari should be granted and the decision reversed.

III. A Company Which Is Forced To Choose Between Lowering Its Prices Or Losing Much of Its Business Does Not Possess "Monopoly Power" Simply Because It Has A Large Percentage Share Of A Narrowly-Defined Market And Because Consumers Are Willing To Pay More For Its Brand-Name Product

This Court should also grant certiorari on the threshold question of whether Borden possessed "monopoly power" —"the power to control prices or exclude competition." *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). The decision below is inconsistent with the law of monopolization in four respects.

First, the FTC used the wrong test in determining whether Borden had "the power to control prices." It reasoned that Borden held such power because, by lowering its own prices, Borden could force its competitors to lower theirs. But the power to drive *down* prices is the power held by any competitor; as this case demonstrates, even Golden Crown was able to drive down the price of the dominant brand, ReaLemon. Monopoly power is just the reverse: it is the ability of a dominant firm to *raise its own prices,* unconstrained by the forces of competition. "The material consideration in determining whether a monopoly exists is [whether] . . . power exists to *raise* prices or to

exclude competition when it is desired to do so." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 811 (1946) (emphasis added). Only when prices can be "raised substantially without . . . losing business" does a seller have monopoly power. *Broadway Delivery Corp.* v. *United Parcel Service*, 651 F.2d 122, 131 (2d Cir. 1981). Borden did not have that power. Indeed, it could not raise prices *even to keep pace with rising costs*: "planned price increases for quart bottles of ReaLemon, occasioned by cost increases, [did not] go into effect in 'highly competitive Golden Crown markets.'" (FTC-57a).

Second, the FTC erroneously concluded that ReaLemon's "price premium" gave it the "power to control prices." But the fact that a well-known product such as ReaLemon sells for a higher price than most other brands does not mean the seller has monopoly power; it simply means that consumers regard the product as superior and will pay somewhat more for it. That is not the *control* over prices which signifies monopoly power. As Judge Kennedy explained:

> "The price premium did not exist because of the monopoly. It was nothing more than evidence of a consumer preference. . . . Manipulation of a consumer preference is not a use of monopoly power unless the preference was somehow created by the monopoly position in the market, and there is no such finding here." (CA-37a).

Third, the FTC erroneously equated the concept of a "barrier to entry" with the ability to "exclude competition." It concluded that the "strength" of the "ReaLemon" trademark was a barrier to entry into the processed lemon juice market. (FTC-52a). But, as this Court has recognized, the "power that . . . soft-drink manufacturers have over their trademarked products is *not the*

power that makes an illegal monopoly." *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) (emphasis added). Moreover, the "RealLemon" trademark certainly did not give Borden the power to exclude competition, particularly in light of the fact that all other barriers to entry were "insignificant."[20] Even Golden Crown, with an adulterated product that was advertised only "on a minor scale in selected markets" (CA-21a), was able within four years to capture 15% of all national sales (and a much higher percentage in a great many local markets). Minute Maid was able to grow still more rapidly, despite selling a *more expensive* product. In just six months, its share jumped from 5.6% to 18.2%. Meanwhile, Borden's share dropped to 65%, compared to almost 90% a few years earlier.[21] When new competitors are able to enter a market this rapidly and this effectively, notwithstanding price competition thought to be "predatory," the dominant firm cannot be said to have the power to "exclude competition."

Finally, the FTC erred in ignoring the fact that Borden had no power to control prices or exclude competition, and relying instead upon an inference drawn from Borden's large share of a narrowly-defined market. In defining the relevant market, the FTC excluded fresh lemons, even though the evidence clearly established that the juice of

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[20] The FTC found that other barriers to entry, including "capital costs, absolute costs, and scale economies, are insignificant." (FTC-69a). "Processed lemon juice is not difficult to manufacture. . . . The raw materials are readily available . . . and the product can be produced using relatively inexpensive equipment." (FTC-41a).

[21] At this level, RealLemon did not have a monopolist's share, even within the narrow market defined by the FTC. As Judge Learned Hand pointed out, "it is doubtful whether 60 to 64 percent would be enough" for a finding of monopoly power. *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

fresh lemons can be and is substituted for every use of reconstituted lemon juice. (JA-495-510, 526-36, 861A). This narrow market definition was crucial to the FTC's finding of monopoly power,[22] but that finding was contrary to the undisputed evidence that Borden could not control prices or exclude competition. A seller such as Borden, which is forced to choose between lowering its own prices or suffering large cuts in its market share, certainly does not have "monopoly power." This Court should grant certiorari to reverse the clearly erroneous finding that it had such power.

[22] "The inclusion of fresh lemons within the product market would necessarily preclude a finding of monopoly power because this would have reduced Borden's market share . . . to less than ten percent." (CA-12a & n. 20).

CONCLUSION

The decision below, by restricting price competition and requiring Borden to maintain a nationally uniform "umbrella" price, denies consumers the benefits of competition previously ensured by the antitrust laws. Equally important, it ignores the central principle that "dominant firms, having lawfully acquired monopoly power, *must* be allowed to engage in the rough and tumble of competition." *Northeastern Tel Co.* v. *AT&T*, 651 F.2d 76, 79 (2d Cir. 1981) (emphasis added), *cert. denied*, 102 S.Ct. 1438 (1982). As Judge Learned Hand pointed out long ago, a "successful competitor, having been urged to compete, must not be turned upon when he wins." *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945). That is exactly what the Sixth Circuit and the FTC erroneously did in this case. Certiorari should be granted and the decision reversed.

Respectfully submitted,

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